may be granted.

**1. Contrary to, or Unreasonable Application of. Clearly Established Federal Law**

Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions." *Williams (Terry.) v. Taylor*, 529 U.S. 362, 412 (2000). Ninth Circuit case law serves as persuasive authority for the purposes of determining whether a particular state court decision is an "unreasonable application" of Supreme Court precedent. This persuasive authority may also help determine what is meant by "clearly established federal law". *Tuan Van Tran v. Lindsey*, 212 F.3d 1143, 1154 (9th Cir. 2000).

A state court's holding may be found to be "contrary to" clearly established Supreme Court precedent if: (1) "the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases" or (2) "the state court confronts a set of facts that are materially indistinguishable from a decision of [the U.S. Supreme] Court and nevertheless arrives at a result different from [its] precedent." *Williams (Terry)*, 529 U.S. at 405-06.

Additionally, a state court holding involves an "unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal rule" but "unreasonably applies it to the facts of the particular state prisoner's case," or "if the state court either unreasonably extends a legal principle...to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* at 407. These two concepts overlap and it is sometimes necessary to test a petitioner's allegations against both standards. *Tuan Van*

*Tran*, 212 F.3d at 1150.

### 2. Unreasonable Determination of the Facts in Light of the Evidence

This Court may also grant habeas relief if the state court's holding "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d)(2) (West Supp. 2002). The Ninth Circuit has held that adjudication of Petitioner's claims involves an "unreasonable determination of the facts" or amounts to an "unreasonable application of law," when "an independent review of the legal question...leaves us with a 'firm conviction' that one answer, the one rejected by the court, was correct and the other, the application of the federal law that the court adopted, was erroneous—in other words that clear error occurred." *Tuan Van Tran*, 212 F.3d at 1153-54; *Torres v. Prunty*, 223 F.3d 1103, 1107-08 (9th Cir. 2000). In examining whether a state court's adjudication was unreasonable, this Court "first considers whether the state court erred at all; only after concluding that an error occurred does this court decide whether that error involved an unreasonable application of controlling law within the meaning of section 2254(d)." *Anthony v. Cambra*, 236 F.3d 568, 578 (9th Cir. 2000), *cert. denied*, 121 S. Ct. 2576 (2001); *Van Tran*, 212 F.3d at 1154-55.

## VI. DISCUSSION

The first issue that this Court must address is Petitioner's claim that his commitment violates his Fourteenth Amendment right to due process of law. Petitioner claims that there was insufficient evidence before the trial court to prove the predicate offenses for commitment under the SVPA. Respondent counters that there was sufficient evidence to

support the trial court's commitment of Petitioner under the SVPA. The second issue this Court must consider is whether the trial court relied on inadmissable hearsay evidence when reaching its decision to commit Petitioner. Petitioner alleges that the trial court relied on inadmissible hearsay, and in doing so violated Petitioner's Due Process Rights and Sixth Amendment right to confrontation of witnesses. Respondent asserts that the statements the trial court relied on are admissible, as they are exceptions to the hearsay rule. Further, Respondent contends that admission of these statements into evidence does not offend Due Process, specifically, and that Petitioner has no right under the Sixth Amendment to confront witnesses in a civil commitment proceeding.

The Court will address each issue in the order presented.

**A. Petitioner's First Contention: Insufficient Evidence Of Substantial Sexual Conduct**

Petitioner asserts that his Fourteenth Amendment right to due process of law was violated when the State failed to provide sufficient evidence to support the trial court's determination that Petitioner's conduct constituted "substantial sexual conduct" to meet the predicate offenses under California Welfare and Institutions Code § 6600.1. (Petition for writ of habeas corpus at 6, attached page.)

Respondent counters that sufficient evidence was presented to support the trial court's finding that there was "substantial sexual conduct" to meet the predicate offenses required under §§ 6600, et. seq. In addition, Respondent counters that Petitioner failed to show that the state court's holding is contrary to, or an unreasonable application of,

federal law. (Respondent's Mem. of P&A's in Supp. of Answer at 9).

**1. Standard of Review for Sufficiency of the Evidence Claims:**

To determine the standard of review for sufficiency of the evidence claims, the Court must first identify and refer to the relevant federal law. *See Williams v. Taylor*, 529 U.S. 362, 407 (2000). The evidentiary standard in civil commitment proceedings under California's SVPA, is analogous to the standard used in criminal proceedings, and requires that plaintiffs prove guilt "beyond a reasonable doubt". *People v. Mercer*, 70 Cal. App. 4th 463, 465-66 (1999) (holding that the standard of review for sufficiency of the evidence claims in SVPA commitments is the same as that for criminal convictions).

In dealing with review of such cases, the Supreme Court holds that:

> [o]nce a defendant has been found guilty of the crime charged, the factfinder's role as the weigher of evidence is preserved through a legal conclusion that...all of the evidence is to be considered in the light most favorable to the prosecution." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). Federal courts need not weigh the evidence to determine if there is guilt beyond a reasonable doubt. Rather, reviewing courts should determine whether the evidence is such that "*any* rational trier of fact could have found the

essential elements of the crime beyond a reasonable doubt.[9] *Id.* (emphasis original).

Additionally, the Supreme Court held that the Fourteenth Amendment's Due Process Clause is violated, and an applicant is entitled to habeas corpus relief, "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 324 (1979). Upon review, federal courts must analyze sufficiency of the evidence claims "with explicit reference to the substantive elements of the criminal offense as defined by *state law*." *Id.* at 324 n. 16 (emphasis added). Federal courts are bound by a state court's construction of its own penal statutes, and must defer to that interpretation unless it is "untenable or amounts to a subterfuge to avoid federal review of a constitutional violation." *Aponte v. Gomez*, 993 F.2d 705, 707 (9th Cir. 1993).

In analyzing Petitioner's sufficiency of the evidence claims, the Court must engage in a thorough review of the state court record. *See Jones v. Wood*, 114 F.3d 1002, 1013 (9th Cir. 1997). "Without such a review of the record, it is

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[9] Although SVPA Commitment hearings are civil proceedings, California Welf. & Inst. section 6604 requires that "the court or jury shall determine whether, beyond a reasonable doubt, the person is a sexually violent predator." Cal. Welf. & Inst. § 6604; *see Addington v. Texas*, 441 U.S. 418, 425 (1979) (holding that civil commitment for any purpose constitutes a significant deprivation of liberty that requires due process protection); *see also People v. Hurtado*, 52 P.3d 116, 117 (Cal. 2002) (holding that in cases involving involuntary commitment, failure to prove the elements beyond a reasonable doubt constitutes reversible federal constitutional error).

impossible to determine whether the state court adjudication rested on an 'unreasonable application' of clearly established federal law or an 'unreasonable determination' of fact." *Id.*

In this case, the California Supreme Court did not state a reason or give any authority in denying Petitioner's Petition for Review, therefore there is no decision from the California Supreme Court to which this Court can look. (Lodgment # 7.) As a result, this Court must rely on the California Appellate Court opinion dated May 11, 2000, *People v. Carty*, No. D033778. This holding will serve as the relevant record when conducting review pursuant to 28 U.S.C. § 2254(d)(1).

**2. Standard of Law - "Substantial Sexual Conduct"**

The SVPA defines a "sexually violent predator" as "a person who has been convicted of a sexually violent offense against two or more victims and who has a diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior." Cal. Welf. & Inst. Code § 6600 (a)(1). Under the SVPA a "sexually violent offense" includes certain enumerated sex crimes[10] "committed by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." Cal. Well. & Inst. Code § 6600(b). Additionally, § 6600.1 states that "[i]f the victim of an underlying offense that is specified in subdivision (b) of § 6600 is a child under the age of 14 and the offending act or acts involved substantial sexual conduct,

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[10] *See* California Penal Code § 288(a) (making it a felony to engage in the touching of a person under the age of fourteen, or any part thereof, with the intent to arouse sexual desires of the perpetrator or the victim).

the offense shall constitute a sexually violent offense for purposes of § 6600." Cal. Welf. & Inst. Code § 6600.1 (a). Subsection (b) includes in its definition of "substantial sexual conduct" "masturbation of either the victim or the offender." Cal. Welf. & Inst. Code § 6600.1 (b). California Courts have determined that "masturbation under the [SVPA] encompasses any touching or contact, however slight, of the genitals of either the victim or the offender, with the requisite intent...." *People v. Chambless*, 88 Cal. Rptr. 2d 444, 451 (Cal. Ct. App. 1999).

In *Chambless*, the Court of Appeal reviewed the legislative history of the SVPA and concluded that the definition of masturbation, which includes mere touching of the victim's genitals, is consistent with the legislature's intent to make criminal certain sexual behavior. The Appellate Court stated:

> [t]he analysis of the Senate Committee on Criminal Procedure regarding Senate Bill No. 2161, 1995-1996 Regular Session, which added section 6600.1, stated the key issue was 'Should the definition of 'sexually violent predator' be expanded to include specified nonviolent sexual offenses on a victim under the age of 14?' Sen. Com. on Crim. Proc., Analysis of Sen. Bill No. 2161 (1995-1996 Reg.Sess.), p. 2. We presume the Legislature in affirmatively answering this question and amending section 6600.1 to include the specific nonviolent act of masturbation in subdivision (b) as substantial sexual conduct was aware of the general use of that term to describe any act of genital touching. Because the Legislature was also aware oft lie 'the [sic] longstanding rule that [Penal Code] section 288 is violated by 'any touching' of an underage child accomplished with the intent of

> arousing the sexual desires of either the perpetrator or the child' [citation omitted], its inclusion of such offenses as predicate crimes under the Act while at the same time requiring they satisfy the definition of substantial sexual conduct evidences its intent to define conduct that goes beyond the mere touching of any part of the body of an underage child required for a conviction under Penal Code section 288, subdivision (a). We thus believe the sexual conduct described by the term 'masturbation' in subdivision (b) of section 6600.1 refers to the specific type of touching required, that of the genitals of either the victim or the offender.

*Chambless*, 88 Cal. Rptr. at 452-53.

Further, in *Chambless*, the Court of Appeal evaluated other sections of the SVPA under well-established rules of statutory construction and contemplated that:

> [b]ecause the legislature took the definition of substantial sexual conduct for the Act (§ 6600. l(b)) directly from Penal Code section 1203.066, subdivision (b) (see Sen. Com. on Crim. Proc., Analysis of Sen. Bill No. 2161, (1995-1996) Reg.Sess.), p. 3), we presume it intended to use the terms in a like manner. [citations].Thus the type or extent of oral copulation sufficient to show substantial sexual conduct under section 6600.1, subdivision (b) would necessarily be the same as that construed by the court in *Grim*.[11]

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[11] *Grim* held that a jury instruction which defined oral copulation as "any contact, however slight, between the mouth of one person and the sexual organ of another person constitutes 'oral

> Similarly, because section 6600.1, subdivision (b) provides that masturbation as well as oral copulation can mean substantial sexual conduct, by parity of reasoning we believe the Legislature intended the extent of touching of the genitals required to meet the definition of masturbation would also be the same as in *Grim*. Hence, any contact, however slight of the sexual organ of the victim or the offender would be sufficient to qualify as masturbation and in turn substantial sexual conduct under the Act.

*Id.* at 453-454.

**3. Review of the California Appellate Court's Decision:**

In denying Petitioner's appeal, the Appellate Court adopted the reasoning set forth in *Chambless*. (Lodgment #5 at 11-13.) Therefore, upon review, this Court shall consider *Chambless*' reasoning, under U.S.C. § 2254(d)(1). First, the definition of "masturbation" delineated in *Chambless* is not untenable, but rather was deduced through the Court's utilization of well founded rules of statutory construction. *See Aponte*, 993 F.2d at 707. In defining "masturbation," the court in *Chambless* looked at the legislative intent of the statute. The court also considered the statutory scheme, and specifically, how analogous portions of the California Penal Code, referenced in the SVPA, had been interpreted by previous courts. Based on the above mentioned evaluation, the *Chambless* court arrived at a definition of masturbation. Further, although the opinion rests solely on California state

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copulation'" was proper. *People v. Grim*, 11 Cal. Rptr. 2d 884, 885 (Cal. Ct. App. 1992).

law, nothing in the opinion indicates an attempt to avoid federal review of a constitutional question. *Aponte*, 993 F.2d at 707. Therefore, under *Jackson* and *Aponte*, this court is bound by the state court's definition of "masturbation."

This determination, however, does not end this Court's inquiry. The Appellate Court did not address Petitioner's due process claim of a failure to provide sufficient evidence to support his commitment, therefore, this Court must "review independently the claims of the petition." *See Delgado*, 223 F.3d 976, 981-82 (9th Cir. 2000) (citing *Delgado I*). However, after an independent review of Petitioner's claim, given the established definition of masturbation, and the fact that masturbation of a child under fourteen years of age is sufficient to constitute "substantial sexual conduct" under the SVPA, and considering the uncontradicted facts set forth in the probation report, it was reasonable for a trier of fact to conclude that the elements of the SVPA were met beyond a reasonable doubt. *See Delgado*, 223 F.3d at 992; *Jackson*, 443 U.S. at 324.

The Court of Appeal of California held:

> When we review a challenge to the sufficiency of the evidence we apply the substantial evidence standard. Under that standard we review the entire record, drawing all reasonable inferences in favor of the decision of the trial court. We do not weigh the evidence nor do we make credibility judgments. We simply determine if, in light of all the evidence, a reasonable trier of fact could reach the conclusion reached in the matter before us. *People v. Mercer* (1990) 70 Cal.App.4th 463,464-465.

> Applying the proper standards we are satisfied there is sufficient evidence to support the trial court's decision.
>
> Carty's conduct in grabbing the genitals of several children, both over and under the clothing constituted masturbation as it has been defined in section 6600.1, subdivision (b) and in our opinion in *Chambless*, *supra*, 74 Cal.App.4th 773. Carty recognizes our opinion is controlling in this case and that the conduct with the children, other than his own, constitutes substantial sexual conduct under *Chambless*. Carty argues that *Chambless* was wrongly decided, We disagree.
>
> We have again reviewed our opinion in *Chambless*, *supra*, 74 Cal.App.4th 773. The Supreme Court has denied review. We remain satisfied with our analysis and will continue to follow it unless directed otherwise by a higher court.

(Lodgment #5 at 11-13.)

The instant case proceeded as a bench trial. Accordingly, this Court will rely on the evidence furnished to the trial judge for a recitation of the facts. In support of the Civil Commitment Petition, the prosecution introduced into evidence a probation report associated with Petitioner's 1991 conviction. (Lodgment #2 at 9-34.) This 1991 probation report included Children's Hospital Examination Reports reciting the victims' accounts of their molestation by Petitioner. *See Id.* at 13-17. Specifically, the report stated that Victim #5, five-year-old Chase A., had explained that Petitioner "pinched" his penis and bit his upper thigh. (Lodgment #1 at 15.) This same probation report included

Petitioner's statement that he admitted to pinching the victim's penis. (Lodgment #1 at 17.) Furthermore, Victim #3, eight-year-old Brandon S., stated that Petitioner had "grabbed" his genital area for several hours. (Lodgment #1 at 13.) The report also contains statements of molestation taken from victims #1, #2, #4, #6 and #7. *See id.* at 13-17.

It follows that the Petitioner's acts, including "pinching" and "grabbing" the victims, constitute "masturbation" under *Chambless*, and additionally, constitute "substantial sexual conduct" under California Welfare and Institutions Code § 6600.1. Since the SVPA only requires that there be two victims, and here there were a total of seven victims (two of which were Petitioner's biological sons), this Court finds that there is sufficient evidence for a "reasonable" trier of fact to find that Petitioner engaged in masturbation with his victims and that this conduct constitutes "substantial sexual conduct" under the California Welfare and Institutions Code § 6600.1. Additionally, this Court finds that sufficient evidence existed for the trial court to determine Petitioner to be a sexually violent predator under California's SVPA. The trial court acted in accordance with established law when it committed Petitioner as prescribed by the SVPA. This Court may only grant habeas relief if the state court's decision was based on an unreasonable determination of the facts or was contrary to, or an unreasonable application of, clearly established federal law. This Court finds that no such error exists here as to warrant habeas relief. Accordingly, Petitioner's first claim fails.

**B. The Trial Court Did Not Err In Admitting Hearsay Evidence**

Petitioner's second assertion is that the trial court erred in admitting into evidence Petitioner's probation report.

Petitioner claims that in admitting said report, the trial court relied on inadmissible hearsay evidence, and then used this evidence to assess whether or not Petitioner met the criteria necessary to be classified as a sexually violent predator. Petitioner contends that in considering this inadmissible hearsay, the trial court violated both his Sixth Amendment right to confrontation of witnesses and his Fourteenth Amendment right to due process of law. To support this argument Petitioner asserts the following: 1) the SVPA does not allow for unlimited admission of unreliable and unsubstantiated testimony; 2) the victims' statements did not fit any exception to the hearsay rule and therefore their admission violated Petitioner's Confrontation and Due Process rights; and, 3) the trial court relied exclusively on multiple levels of hearsay that were both inadmissible and highly unreliable in determining that Petitioner was a sexually violent predator.

In opposition, Respondent asserts that the SVPA specifically allows for documentary evidence, such as probation reports, to be used to establish the predicate offenses during civil commitment proceedings. Further, Respondent asserts that the legislature intended this type of documentary evidence to be an exception to the hearsay rule and admissible in SVPA civil commitment proceedings. In addition, Respondent asserts that the trial court's admission of Petitioner's probation report cannot be shown to be contrary to or an unreasonable application of federal law. Also, Respondent challenges whether Petitioner has even alleged a cognizable claim, as generally state evidentiary rulings do not serve as a basis for federal habeas relief.

In regards to Petitioner's constitutional challenges, Respondent asserts that Petitioner's Sixth Amendment right to confrontation is not offended by the SVPA's hearsay

exception because commitment proceedings pursuant to the SVPA are civil proceedings. The Sixth Amendment's right to confrontation is reserved for criminal proceedings. Respondent argues that any rights Petitioner might have to confront and cross-examine witnesses in a civil proceeding would be Fourteenth Amendment Due Process rights, and not Sixth Amendment rights. Lastly, Respondent contends that there was no due process violation when probation reports, which included hearsay statements, were considered in these proceedings, as Petitioner was afforded the opportunity to challenge the hearsay statements at his sentencing hearing.

**1. A Cognizable Claim Must Be Presented To Obtain Federal Review**

In order to obtain federal habeas review, a petitioner must allege a deprivation of a federal right pursuant to § 2254. A state's interpretation of its laws or rules provides no basis for federal habeas corpus relief because no federal constitutional question arises. *See Estelle*, 502 U.S. at 68 (stating that federal habeas corpus relief does not lie for errors of state law, and federal courts may not reexamine state court determinations on state law issues); *see also Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (federal courts must respect state court's application of state law); *Jackson v. Ylst*, 921 F.2d 882, 885 (9th Cir. 1990) (federal courts have no authority to review state's application of state law); *Oxborrow v. Eikenberry*, 877 F.2d 1395, 1400 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to level of constitutional violation).

State court errors in the application of state evidence rules are not a sufficient basis for habeas relief. *Fuller v. Roe*, 182 F.3d 699, 703 (9th Cir. 1999). "A state court's procedural or evidentiary ruling is not subject to federal habeas review

unless the ruling violates federal law, either by infringing upon a specific federal constitutional or statutory provision or by depriving the defendant of the fundamentally fair trial guaranteed by due process." *Walters v. Maass*, 45 F.3d 1355, 1357 (9th Cir. 1995). (*See Pulley v. Harris*, 465 U.S. 37, 41 (1984); *Jammal v. Van de Kamp*, 926 F.2d 918, 919-20 (9th Cir.1991); *Middleton v. Cupp*, 768 F.2d 1083, 1085 (9th Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986). The admission of evidence must be an error "of such magnitude that the result denies a fundamentally fair trial guaranteed by due process." *Fuller*, 182 F.3d 703. (*See Colley v. Sumner*, 784 F.2d 984, 990 (9th Cir. 1986)).

Given the above analysis, those claims alleged by Petitioner, to the extent they rely on state law, are not cognizable claims for federal habeas review. In regards to Petitioner's allegation that the admission of hearsay statements was so prejudicial as to amount to violations of his Sixth and Fourteenth Amendment Due Process rights, this Court will review those claims.

**2. Petitioner's Sixth Amendment Claim**

The Sixth Amendment to the United States Constitution provides:

> [i]n all *criminal* prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his

> favor, and to have the Assistance of Counsel for his defense.

(U.S. Const., amend. VI) (emphasis added).

The Sixth Amendment affords protection to all criminal defendants in "criminal prosecutions." *Id.* In reviewing a Kansas statute similar to California's SVPA, the United States Supreme Court held that commitment proceedings provided by Kansas' SVPA statute were civil in nature, and not criminal. *See Kansas v. Hendricks*, 521 U.S. 346 (1997).

Since Petitioner's claims arise out of a civil commitment proceeding, which is civil in nature and not criminal, the Sixth Amendment right to confrontation is inapplicable. Accordingly, Petitioner's claim that his Sixth Amendment right to confrontation has been violated should be denied.

**3. Petitioner's Due Process Claim**

Petitioner asserts that his right to due process of law under the Fourteenth Amendment was violated by the admittance of hearsay evidence, specifically statements and facts contained in his probation report. Petitioner contends that this evidence was inadmissible as it violated an essential part of Due Process; his right to confront and cross-examine witnesses against him.

The Supreme Court has recognized that civil commitment "constitutes a significant deprivation of liberty that requires due process protection." *Addington v. Texas*, 441 U.S. 418, 425 (1979). The Supreme Court has also held that there is a procedural due process right to confrontation in civil proceedings. *See Willner v. Committee on Character and Fitness*, 373 U.S. 96, 105 (1963). In *United States v. Owens*,

the Supreme Court stated: "the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *United States v. Owens*, 484 U.S. 554, 559 (1998) (citations omitted). Accordingly, this Court may review the instant habeas petition only if Petitioner was not given an effective opportunity to confront those who accused him of substantial sexual conduct with the respective victims.[12]

The California Court of Appeal ascertained that Petitioner was given an adequate opportunity to confront and cross-examine the witnesses presented by the Prosecution. In considering the SVPA's hearsay exception and whether or not Petitioner was given his requisite due process, the Court stated:

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[12] No hearsay objection can be raised because under the SVPA, in a civil commitment trial,

> [t]he existence of any prior convictions may be shown with documentary evidence. The details underlying the commission of an offense that led to a prior conviction, including a predatory relationship with the victim, may be shown by documentary evidence, including, but not limited to, preliminary hearing transcripts, trial transcripts, probation and sentencing reports, and evaluations by the State Department of Mental Health. Jurors shall be admonished that they may not find a person a sexually violent predator based on prior offenses absent relevant evidence of a currently diagnosed mental disorder that makes the person a danger to the health and safety of others in that it is likely that he or she will engage in sexually violent criminal behavior.

Cal. Welf. & Inst. Code § 6600(a)(3). Even if Petitioner had raised an evidentiary objection, the Court could not reach the merits of such a claim as that would involve interpretation of state law.

The trial court reasoned, and we agree, that the probation report was the subject of potential challenge at the time of sentencing. Carty had both the opportunity and the motivation to challenge any inaccuracies in that report. Therefore, the report in its final form carried greater reliability, justifying legislative acceptance on that type of document as a method of proof....

We start our analysis with the observation that a proceeding under the [SVPA] is a civil proceeding and not a criminal case. Therefore the Sixth Amendment rights do not attach. On the other hand, a respondent in a civil proceeding, such as this, has a due process right to confront and cross-examine witnesses. (*Hubbart*, *supra*, (1999) 19 Cal.4th at pp. 1174-1175; *In re Melinda S.* (1990) 51 Cal.3d 368, 383 fn. 16.) Under a due process analysis we look to see if the method for challenge available to the respondent provides the benefits that derive from confrontation and cross-examination. (*Howard*, *supra*, 70 Cal. App.4th at p. 154.)

Carty had the ability to call witnesses and to challenge the accuracy of the probation officer's report. He could have presented conflicting evidence on his own behalf in order to undermine the prosecution's case. (§ 6603.). Thus we agree with the court in *Howard*, *supra*, 70 Cal. App.4th 136, that the Act does meet due process standards in permitting the prosecution to go forward and prove the details of past crimes without having to bring back the victims to again prove the crimes against them: The legislative balance of interests is appropriate because it, like the procedure in *In re Melinda S.*, *supra*, 51 Cal.3d 368,

> provides a respondent with a meaningful opportunity to attack the credibility of the prosecution's evidence. The trial court did not err in admitting the probation report.

(Lodgment #5 at 10-11.)

Given the analysis done by the Court of Appeal, and upon its own review of the entire record, this Court concurs with the finding that Petitioner was afforded sufficient due process. Specifically, he was given a reasonable opportunity to effectively confront the evidence against him. In fact, Petitioner was given a direct opportunity to confront the evidence in the probation report at the bench trial by presenting rebuttal evidence in the form of contrary documentary evidence or witness testimony, or of calling the individuals who made mental evaluations regarding Petitioner's mental state to question the bases of their respective evaluations. Lodgment #2 at 34-36. However, Petitioner failed to present any such evidence, and in fact waived his right, at the commitment trial, to confront and/or present such witnesses. *Id.*; *See also* Respondent's Mem. of P&A's in Supp. of Answer at 17. Though Petitioner was given several opportunities to challenge the evidence contained in his probation report, he failed to do so.[13] Because due process requires that Petitioner be afforded the opportunity to rebut or call into question the evidence presented by plaintiffs, and Petitioner was given such opportunity at trial, this Court concludes that Petitioner was afforded sufficient due process of law in the civil commitment proceeding. Accordingly, Petitioner's due process argument fails and the petition should be denied.[13]

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[13] Under this Court's reading of the California Court of Appeal's opinion regarding Petitioner's commitment, it is noted

## VII. CONCLUSION AND RECOMMENDATION

After a thorough review of the record in this matter, the undersigned Magistrate Judge **RECOMMENDS** that the Petition for Writ of Habeas Corpus be **DENIED** with prejudice. This Report and Recommendation of the undersigned Magistrate Judge is submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. § 636(b)(1).

**IT IS SO ORDERED** that no later than **February 24, 2003**, any party to this action may file written objections with the Court and serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation."

**IT IS FURTHER ORDERED** that any reply to the objections shall be filed with the court and served on all parties no later than **March 10, 2003**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

Dated: 2-7-03 /s/_____
Hon. James F. Stiven
United States Magistrate Judge

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that at the underlying criminal trial, Petitioner pled guilty to the seven counts against him (albeit the plea was under *People v. West* for the five counts not involving his two sons) and thus Petitioner elected, at the criminal trial, not to contest the governments evidence of guilt. Further, it appears that at the sentencing hearing for the underlying criminal conviction, Petitioner could have, but did not present evidence to rebut or contradict the probation report.